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Food, Humor, and Law: Liability for Comical Restaurant Reviews

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Abstract: Restaurant reviews have powerful influence over a business's success. Consequently, legal disputes often arise about whether a restaurant can recover damages for a negative review. Under U.S. law, complications emerge from lawsuits centering on restaurant reviews because reviews usually express opinion. Opinion is protected speech under the U.S. Constitution. This means that an expression of opinion escapes legal regulation: legal regulation includes a successful lawsuit for damages. Lawsuits might succeed, however, if a restaurant review states untrue facts. Yet matters become even more complicated because restaurant reviews often include jokes. U.S. law sometimes protects humor, sometimes not. Complicating matters is legal protection for statements that appear on the Internet, which now hosts the majority of restaurant reviews. The legal protection is broad, but not complete. This article reviews U.S. law as it pertains to comical reviews—some of which appear on the Internet, some of which do not.

Introduction

At what point does a joke about a restaurant's food become a legal wrong, justifying resort to defamation law? On one hand, an offhand joke about food between friends or acquaintances hardly seems to call for legal action. But restaurant reviews can wield much power over the fate of a business. Indeed, the power of critics to make or break restaurant

success is well documented (Frazier, 2016) (Kravitz, 2002). Reviews—even humorous ones—are serious business for restaurants, inspiring them to file lawsuits, especially when the damage is grave. Aggressive reviews can close restaurants. What are the chances of winning these defamation suits? At one time, an aggrieved restaurant in the United States had a chance of recovering damages. While restaurants in other countries still encounter occasional success in pursuing fines or defamation suits, the chances for a favorable U.S. verdict have currently diminished to almost nothing--particularly now in the age of internet reviews.

For years, the challenge of charting a line between protecting and restricting humor has dogged U.S. courts. The task has proven difficult. The first challenge is that the regulation line must navigate a stark value clash: the right of individuals and groups to be free from attack on their property, dignity, and honor (on one hand) versus the right of individuals to free expression (on the other). Complicating this enterprise, the line separating protected expression from liability-creating words must also respect the artistry of comedy and its beneficial contributions to society. U.S. law routinely confronts the issue of humor regulation with little hesitation, restricting and punishing humor in many contexts, including suits to punish criminal transgressions or to protect personal civil rights governed by contract, intellectual property, employment discrimination, and defamation laws (Little, Just a Joke: Defamatory Humor and Incongruity's Prmise, 2011) (Little, Regulating Funny: Humor and the Law, 2009).

What accounts for the difference with restaurant reviews? Restaurant reviews are – for the most part – idiosyncratic expressions of fleeting phenomenon: in this case, mainly, food on a plate. This observation helps to show the special challenge of regulating restaurant reviews, although one easily can think of other idiosyncratic descriptions of fleeting parts of life that do not escape liability. Consider an insult uttered in the heat of argument or an ill-considered tweet.

With some frequency, successful civil or criminal suits have sprung from such expressions of thought. One wonders then about what may be particularly special about food that protects it from trouble. A partial answer might be found in how the context of food **exaggerates** the transient and one-of-a-kind qualities of life's experiences. Food usually disappears promptly in a restaurant: either we eat it or a server takes it away. This ephemeral quality makes it difficult to verify or to prove a bad restaurant experience in a lawsuit. And then there is the phenomenon of gastric distress. No imagination is needed to understand that this distress presents proof problems: it is experienced privately and not easily connected directly to particular restaurant food—even though the person experiencing the distress might feel otherwise. Equally (perhaps more) importantly, food taste is highly individual. The ability to discern and appreciate certain tastes and smells varies considerably depending on personal genetics and the culinary traditions of a person's upbringing. One can see then why liability for opinions about restaurant food might provide a tenuous basis for liability—prompting courts to dismiss complaining lawsuits with little hesitation.

What's so interesting then is that – despite the personalized nature of food enjoyment—restaurant reviewers hold strong power to influence others. Humans really want to hear what others think about food—whether or not there is any merit to the concept of a "food expert" (Vanderbilt, 2016, pp. 184-222). Exploring qualities such as acquired taste, facility with language description, memory (a trained eye), confidence, and the ability to acquire information, one study suggests that professional food reviewers actually do have something to contribute about the quality of restaurant food to the lay consumer (Vanderbilt, 2016, pp. 184-222). Whether or not this conclusion holds validity, most would agree that--when a food description is unfavorable (and particularly when that unfavorable gloss is entertaining and funny), the food image is hard to

dispel and the damage to appetite becomes certain. Combine this reaction with the status and vanity that surround restaurant eating, one can easily see how the damage to an earnest business, such as new restaurant, from a negative review can be devastating. This does not even account for the staying power of reviews that make us chuckle. The history and parameters of legal liability for restaurant reviews thus merits closer attention.

I. U.S. Law of Defamation and Free Expression

In challenging food reviews, most injured parties use a defamation theory, a concept designed to protect the interest of an individual or business in preserving reputation. As formally defined under state common law (court-made law) in the United States, a defamatory statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" or her (American Law Institute Sec. 559, 1977).[1] The standard elements of the defamation case, however, require not only that the plaintiff show that a challenged statement is defamatory, but also that the statement is false. Here lies the problem with regulating defamatory humor: it does not fit easily into the paradigm of truth and falsity. Humor is by definition not "serious," thus suggesting that it operates outside the realm of anything one could verify. In some cases, this complication has scared off courts from finding defamation liability for funny statements. But not always. We know instinctively that many a truth has been said in jest.

When it comes to the type of expression found in restaurant reviews, several further protections emerge. First is the notion of "fair comment:" the common law privilege of fair comment long performed a sorting process, insulating criticism relating matters of public concern from jabs giving rise to liability. As lower courts applied this privilege, they also distinguished between humorous assertions that were based on fact (which were actionable) and

assertions based on opinion (which were not). The distinction has developed into an important common law (court-made law) and constitutional distinction between fact and opinion. In the authoritative distillation of the court-made law of wrongs in the United States, the Restatement (Second) of Torts, this distinction appears as follows: "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion" (American Law Institute Sec. 566, 1977). For humorous expressions, the Restatement (Second) of Torts further elaborates: funny "writings, verses, cartoons or caricatures that carry a sting and cause adverse rather than sympathetic or neutral merriment may be defamatory" (American Law Institute Sec. 566 cmt c, 1977). That said, the Restatement further explains that no actionable defamation occurs where a communication evinces "a harsh judgment upon known or assumed facts" because in that circumstance the communication is "no more than an expression of opinion of the pure type" (American Law Institute Sec. 566 cmt d, 1977).

The United States Supreme Court has imported the opinion/fact distinction into constitutional doctrine. Relying on the power of free debate to bring out the truth, the Supreme Court has declared that opinions are insulated from legal liability by the U.S. Constitution's protections of freedom of expression. Recognizing that an opinion can seem exceptionally "pernicious," the Court has explained that "we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas" (Gertz v. Robert Welch, Inc., 1974, pp. 339-340). Thus, we know that under U.S. law, an opinion is protected, but a false statement of fact is not. The problem, of course, lies in the sorting process: precisely what kind of expression constitutes protected opinion? The Supreme Court has refused to articulate a uniform definition of opinion, stating that it would not create "an artificial dichotomy between 'opinion' and fact"

(Milkovich v. Lorain Journal Co., 1990, p. 20). Rather the Court has simply said that the Constitution protects statements that cannot "reasonably be interpreted as stating actual facts" (Milkovich v. Lorain Journal Co., 1990, p. 20).

Lower courts in the United States have struggled heroically to put meat on the bones of this fact/opinion distinction. Various tests have kicked around, but one that has proven particularly popular comes from the United States Court of Appeals for the District of Columbia Circuit. This test evaluates whether something is opinion by asking four questions: (1) whether the communication is ambiguous or precise; (2) whether the communication is verifiable; (3) whether the communication's context suggests that the communication should be interpreted as objective fact; and (4) whether the communication's general context provides guidance on how it should be interpreted (Ollman v. Evans, 1984, pp. 979-984). Given that common sense suggests that a restaurant review is by its nature the opinion of one person, with one set of sensibilities and taste buds, the inclination to evaluate the context of a restaurant review is most certainly a context suggesting personal opinion is at work.

A review of the core values animating the First Amendment sheds light on what the Supreme Court is trying to achieve by protecting opinion. Courts and scholars generally agree that constitutional protection for freedom of expression serves four key values: truth seeking, democratic self governance, social tolerance, and individual autonomy (Chemerinsky, 2006, pp. 925-932). When opinions are free from potential liability, the argument goes, vigorous exchange of views can occur and truth emerges. Free flow of opinion can help citizens make informed electoral choices and government officials form well-considered policies. Moreover, allowing the free expression of opinion demonstrates society's broadmindedness and celebration of diversity. By contrast, the dissemination of false facts does not facilitate society's search for

truth, promote tolerance, or foster wise government decision-making. Finally, allowing expression of personal opinion advances citizens' sense of personal identity and autonomy. The same benefits do not flow from open expression of false facts. To be sure, an individual's freedom to state something false may promote a sense of their own personal autonomy. But the false facts inflict a reputational injury on the individual who is the subject of falsity, thus sabotaging benefit to society. Moreover, the damage to reputation shows intolerance toward the target individual and detracts from the individual's sense of identity (Chemerinsky, 2006).[2]

Equally important to understanding defamation issues in restaurant reviews is another line of U.S. Supreme Court cases confronting constitutional protection for colorful language. The first cases in this area did not present issues about joking, but nevertheless wrestled with the type of vivid language that jokesters—and witty restaurant reviewers-- often use. In one case, the Court ruled that a newspaper story alleging "blackmail" could not be the basis for defamation liability because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet (Greenbelt Publishing Association v. Bresler, 1970, pp. 13-14). In yet another case, the Court found the Constitution protected use of the slang word "scab" as applied to non-union members, explaining that the term is "merely rhetorical hyperbole, a lusty and imaginative expression of contempt" (Letter Carriers v. Austin, 1974, pp. 285-286). Along with the opinion/fact dichotomy, these Supreme Court rulings have proved influential—indeed often controlling—in restaurant review disputes.

The final relevant concept emerging from both the constitutional and non-constitutional case law concerns parody. As shown below, U.S. courts evince strong solicitude for parodies, which are considered a significant part of U.S. culture, discourse, and tradition. In those

instances when anything connected with food or restaurants can be classified as a true parody, one can expect full protection from liability.

II. A Taxonomy of Funny Restaurant Review Cases from the Print Press

Over the years, the print press has offered up many professionally written restaurant reviews that are funny, yet savage, assessments of a restaurant's food, atmosphere, efficiency, and professionalism. The universe of reviews divides roughly into three categories: (1) serious reviews with strong and graphic criticism; (2) serious reviews with extravagant claims or hyperbolic analogies; and (3) parody reviews. These categories are decidedly not fixed, but are simply a heuristic for analysis: many reviews may blend among the categories. Helpfully, the three-part organization dovetails with the structure of the overarching legal principles.

For those reviews that resulted in a lawsuit, one is hard pressed to find many examples that resulted in a liability verdict upheld on appeal. Nonetheless, the direct and indirect consequences of litigation can have significant detrimental impact on both the restaurant that brought suit and the entity being sued (whether that entity is the reviewer, the publisher, or both). Even the threat of a lawsuit can influence behavior. For that reason, understanding how courts have dealt with funny reviews holds practical instruction, even though the ultimate result of lawsuits are now easily predicted given the multiple barriers to recovery.

A. Serious Reviews with Strong and Graphic Criticism

Serious reviews with strong and graphic criticism generally track case law distinguishing between protected opinions and actionable statements of fact. Perhaps the most famous case reckoning with distinction is a serious review, a serious review that was also brimming with opinion that came from a premier court in the United States, the U.S. Court of Appeals for the

Second Circuit. Brought by a chic Chinese restaurant in New York City, the case was filed against the publisher of the Gault/Millau Restaurant Guide to New York. The court's reasoning is representative of other decisions pertaining to strong and graphic reviews.

The review of the restaurant, named Mr. Chow's, would promote a withering response, even for a chef and restauranteur with the strongest backbone. The review was not exactly hilarious, but was graphic. It observed that the waiters in this Chinese restaurant were Italians (not anyone of Chinese extraction) intent on selling expensive alcoholic drinks and food that had "only the slightest relationship to the essential spirit of Chinese cuisine." The dumplings, the review observed, had "heavy and greasy dough" and resembled "bad Italian ravioli." What's more, the review continued, "the steamed meatballs had a disturbingly gamy taste, the sweet and sour pork contained more dough (badly cooked) than meat, and the green peppers which accompanied it remained still frozen on the plate" (Mr. Chow of New York v. Ste. Jour Azur S.A., 1985, p. 221). Importantly, the review also complained that the Peking Duck was served as one dish rather than the traditional three dishes. If there is humor in any of this, it comes from unadorned candor.

When submitted to a jury to consider whether a defamation judgment was appropriate, the jury returned a significant verdict for the restaurant. But the appeals court overturned that verdict. Why? In the court's view, all the statements were either opinion, hyperbole, metaphoric, or all of these things. For the court, the only exception to these protected characterizations was the statement that the Peking Duck dish did not follow the traditional presentation—and should have presented three separate dishes. Nonetheless, the court reasoned that no liability could follow for this potential untruth because no proof existed that the Peking Duck description was asserted with actual malice, the standard the court deemed applicable because the man who ran

the restaurant—Mr. Chow—was a public figure. The court's determination that a restaurant owner could be a public figure is significant in terms of defamation cases. Under U.S. constitutional principles the standard for winning a defamation case against a public figure is much higher than that for a private person. Actual malice would require proving a description was made with knowledge of its falsity or with reckless disregard for the truth. (The actual malice ruling in *Mr. Chow* had particular ramifications for restaurants owned by celebrity chefs, who most certainly qualify as public persons). As for the rest of the court's reasoning, one might reasonably query whether the statement: "the green peppers . . .remained frozen on the plate" constituted pure opinion. Were the peppers still frozen or not? That inquiry seems within the realm of fact. But the court simply dismissed the description as a suggestion the peppers were cold.

The message from the *Mr. Chow* case has had significant influence on cases handling similarly serious reviews—both in and out of the restaurant context. Courts seem quite satisfied with funneling serious restaurant review cases either down the "opinion" and "public figure" chute. The easy route is one, the other, or both: thus easily allowing the court a decision of that avoids critic liability.[3]

B. Serious Reviews with Extravagant Claims or Hyperbolic Analogies

Reviews with extravagant claims and hyperbolic analogies tend to be high on the comedy scale—although of course, like taste buds, the laugh potential for something like a restaurant review is highly individual. Although arguably funnier than the serious reviews featuring only strong criticism, extravagant and hyperbolic analogies are similarly successful in escaping liability as compared to reviews without rhetorical flourishes. The legal analysis does not

require deft footwork to avoid the suggestion that the reviews contain factual components. In one review, the critic described a fine dining restaurant as "a high-class fast-food joint[]….that suffered from 'geographical schizophrenia'" and offered a fish dish that "tasted like old ski boots" (Greer v. Columbus Monthly Pub. Corp., Ohio Ct. App., 1982, p. 448). Another review evaluating a New Orleans restaurant bore the lead line: "T'aint Creole, t'aint Cajun, t'aint French, t'aint country American, t'aint good." The review included descriptions such as "hideous sauces," "a travesty of pretentious amateurism," "bizarre improvisation," "horrible multi-layered rice," and (referring to a classic New Orleans oyster dish) "a ghastly concoction combining all manners of strange flavors that are too weird even for this grand variable of the Creole cuisine" (Mashburn v. Collin, La. 1977, pp. 887-888). Does this fall within the category of "rhetorical hyperbole"? The court concluded: certainly yes. Any doubt for the court that this review that should be insulated from liability was the statement that an "ugly green sauce" that rendered a dish "trout à la plague" with the same effect on appetite as the review's conclusion that another sauce (this time a yellow sauce) amounted to "yellow death on duck" (Mashburn v. Collin, La. 1977, pp. 887-888).

Since these reviews inspired long-odds litigation, one assumes that they inflicted significant lost business—and thus deep losses—on the restaurant. Even when these lawsuits were filed (before the internet), it was enormously difficult to win a restaurant review lawsuit. But there is at least one example of a high profile, amusing, and extravagantly negative printed review that had no apparent effect on a restaurant's success. In 2012, renowned restaurant critic from THE NEW YORK TIMES, Pete Wells, published a scathing review of a restaurant in Times Square. The review contained such statements as:

> "Hey, did you try that blue drink, the one that glows like nuclear waste? The watermelon margarita? Any idea why it tastes like some combination of radiator fluid and formaldehyde?"; and
>
> "Is the shapeless, structureless baked Alaska that droops and slumps and collapses while you eat it, or don't eat it, supposed to be a representation in sugar and eggs of the experience of going insane?" (Wells, 2012).

Despite this apparently lacerating language—the restaurant flourished and was reported to be the "35th top-grossing independently owned restaurant in the" United States three years after the review ran (Smith, 2016). The lesson: terrible reviews are usually, but not always, devastating to restaurant success.

For those restaurants that do not share such a Teflon-coated reputation, the options for dealing with serious reviews containing strong criticism or extravagant languages are now limited. Although a favorable verdict that withstands appellate court scrutiny is highly unlikely, aggrieved restaurants do have a few other options. To begin with, after a restaurant files suit, quick settlement for a monetary amount is always possible. In one Philadelphia case, a complaining restaurant substantially raised the stakes on a newspaper by insisting that the restaurant critic provide videotaped testimony. This maneuver increased leverage on settlement because the critic routinely shielded his appearance from the pubic and visited restaurants anonymously in order to ensure that his restaurant experiences were close to those of any other patron (Romenesko, 2007). Another way that restauranteurs sometimes seek revenge is by taking advertisements out in newspapers that ran critical reviews, providing a reasonable deconstruction of the negative reviews. The success of this approach is dubious: newspapers apparently appreciate the act of taking out an advertisement whether it criticizes a newspaper not, since it brings much needed advertising revenue to the paper (Baram, 2007).

C. Parody Reviews

Parodies pertaining to restaurants, food, and drink are a popular art form –particularly on the internet. Parodies do not always poke fun at restaurants themselves, but also spoof on restaurant menus,[4] advertising campaigns, and even restaurant reviews themselves.

When deciding whether to impose liability for such spoofs, courts often try to evaluate whether the attempt at humor constitutes a true parody. If so, the parody is deemed incapable of creating defamation liability or liability for other wrongs such as trademark infringement. What is a true parody? Courts frequently say that a true parody depicts an "original" in such a way as to make clear that the parody is about the "original," but is sufficiently unlike the "original" as to avoid confusion with it. If the attempted parody passes this test, the reasoning goes, the audience understands that the communication is a joke. In the context of defamation, one source described the test as follows:

> Defamation is, by its nature, mutually exclusive of parody. By definition, defamation requires a false statement of fact; parody, to the degree that it is perceived as parody by its intended audience, conveys the message that it is not the original and, therefore, cannot constitute a false statement of fact…. If a parody could be actionable because, while recognizable as a joke, it conveyed an unfavorable impression, very few journalistic parodies could survive. It is not for the court to evaluate a parody as to whether it went too far, for purposes of a libel claim; as long as it is recognizable to the average reader as a joke, it must be protected or parody must cease to exist (American Jurisprudence, 2d Sec. 156, 2006).

A classic, older example of a food parody that landed in court arose from a comedy routine by comedian Robin Williams. In an effort to lampoon the advertising practices and snobbery of wine producers, Williams developed the concept of a black wine (as distinguished from a white or red wine) that was "'tough enough' to be advertised by 'Mean Joe Green'" (Polygram Records, Inc. v. Superior Court, Cal. Ct. App. 1985, p. 260). In the crescendo of its decision insulating this caricature from liability, the court concluded that Williams' "suggestions that the

hypothetical wine is a 'motherf*ck*r,' black in color, tastes like urine, goes with anything 'it' damn well pleases, or is 'tough' or endorsed by ruffians" could not reasonably be interpreted as accurate depiction of reality, but instead presented "obvious figments of a comic imagination impossible for any sensible person to take seriously. . ." (Polygram Records, Inc. v. Superior Court, Cal. Ct. App. 1985, p. 261). In other words, the parody could not be reasonably interpreted to be a defamatory slur on the wine industry.

A related example concerned a restaurant spoof that actually CREATED a parody restaurant. In what many thought was an editorial on the undeserved success of Starbucks restaurants, a Comedy Central comedian created a physical store in 2004, which included a remarkably accurate-looking store sign announcing the business as "Dumb Starbucks." Consistent with this theme, nearly everything in the place included the modifier "Dumb": the store boasted a wall menu that listed dumb latte, dumb cappuccino, etc.—and also included the usual size options: dumb tall, dumb grande, and dumb venti. The Starbucks company appeared serious about stopping the parody store from operating, stating that "they cannot use our name, which is a protected trademark" (Lee, 2014). Any potential lawsuit, however, was derailed: before matters devolved into a lawsuit, health authorities shut down the place for insufficient permits.

A search of case law regarding restaurant reviews reveals little in the way of lawsuits inspired by parody reviews in the last several decades. This is no doubt partially attributable to the 1988 U.S. Supreme Court decision in *Hustler v. Falwell* (Hustler v. Falwell, 1988). The parody at issue in the *Hustler* case spoofed an advertising campaign by makers of the aperitif Campari, which featured famous people describing their first time trying the drink. The parody depicted a

famous U.S. religious figure, Reverend Jerry Falwell, describing his "first time." In the parody ad run by Hustler Magazine, the first time did not refer to drinking Campari…but having sex. And what were the details of Falwell's first encounter described? The advertisement described Falwell having sex with his mother in an outhouse. Denying liability for Falwell, the *Hustler* Supreme Court determined that a public figure such as Falwell could not recover damages for a parody unless he showed that Hustler Magazine had acted with knowledge of the falsity of facts asserted in the communication or with reckless disregard for the truth or falsity of any facts asserted. In the course of its reasoning, the Court celebrated the role of parodies in our cultural tradition, noting that our national "political discourse would have been considerably poorer without them" (Hustler v. Falwell, 1988, p. 55). Drawing from the earlier constitutional precedent focusing on the relationship between defamation and falsehoods, the Court held that the parody ad could not reasonably have been interpreted as asserting "actual facts" about Falwell or actual events in which he participated. The Court thus reinforced the principle that the U.S. Constitution shields from liability communications that are not reasonably interpreted as factual.

The message of this case law is clear: U.S. courts should go out of their way protect parodies. Consequently, legal challenges to restaurant review parodies are well-nigh impossible to win. Although one might query whether—given U.S. cultural affinity for parody-- parody cases are in a class by themselves, the current bottom line for print restaurant reviews appears shared among all reviews: one simply should not expect to win a lawsuit challenging a print restaurant review.[5] Only a clever strategic maneuver might gain a restaurant any type of tactical advantage in seeking recovery. As if those were not enough barriers, the advent of internet restaurant reviews brings yet another set of obstacles.

III. Legal Liability for Internet Restaurant Reviews

There is a new force for appraising the quality of a restaurant: customer internet reviews. In part, these reviews are simply the new mode for word-of-mouth recommendations among consumers. But –importantly--they are displacing the power of professional reviews in traditional print publications. A restaurant trade organization reported in 2012 that 34 percent of customers report that the reviews on internet review sites are likely factors in choosing a restaurant (National Restaurant Association, 2015). Moreover, because the internet reviews hold greater sway with young adults, the importance of online reviews will grow as this population joins the ranks of frequent diners.

The available sites for customers to post reviews are proliferating in the United States: Foursquare, Google Places, OpenTable, Tripadvisor, Urbanspoon, Yelp…to name a few. Although the features of each site vary, all share a basic concept: peer reviewers post their complements, insults, and tips about restaurants for the benefit of other potential diners. In nearly all cases, then, the reviewers are not food professionals. Either because of or despite of this fact, the reviews can be colorful, uninhibited, and occasionally very funny. It bears noting that sites like Yelp have started to create hierarchies of reviewers—elite Yelp reviewers, Groupon users, and the like. For whatever reason, reviews from those who do not fall into any special category are more likely to be the most striking. Consider the following review of an Indian restaurant:

> The Duck Biryani, a special not on the menu, I would say, is not worth it. It's two cups of rice and a duck thigh, and we were surprised to discover later that it cost $28. My wife thought it was going to be around $8. My sense of remorse doubled this morning as it ripped its way out of me in a raging fiery whirlwind of poopy terror.

> This meal was delectable, exotic, and incinerated everything in my intestines. My morning was an unforgettable thrill ride.
>
> The exotic flavors and aromas of India came flooding back to me as I literally peed out of my butt.
>
> 4 stars for the truly delicious food and unimpeachable service, minus one star for expensive biryani, and for turning me into a human flamethrower (Hilarious Yelp Review, 2013).

For the subject Indian restaurant, is this a potentially devastating review? Of course it is. The potency of restaurant reviews comes in substantial part from creating tenacious images implicating the primordial desire to enjoy eating delicious food and to avoid poisonous items. This review certainly evokes the "avoid" part of that human instinct and an expected drop in business certainly might inspire the restaurant consider legal action. Yet even leaving aside the obstacles of constitutional guarantees for free expression and the common law defense of fair comment, a suit on this review would confront a more fundamental obstacle. The restaurant could not likely even make out the elements of the defamation claim. How on earth would the restaurant prove that the description of a morning's "unforgettable thrill ride" was an accurate statement attributable to the restaurant's food? Remember: the restaurant filing the lawsuit must prove the review presents false facts.

Making the barriers to recovery even higher – is a special protection for peer reviews on the internet. A federal statute provides immunity from liability for those who make possible an internet platform for the communications of others. Specifically, the U.S. Communications

Decency Act, 47 U.S.C. § 230(c), states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information provider." This statute effectively removes internet services like Yelp as potential defendants, leaving only the original person who posted the review. This does not mean that the original poster cannot be sued successfully—but such individuals can be hard to find and likely lack the deep pockets necessary to justify the expense of a lawsuit. Moreover, in compelling cases, a restaurant may be swept in with the legal problems targeted on the original person who posted a defamatory review. A recent case suggests that a court-enforced order (injunction) to remove a review from an internet service against original private individual who uploaded a comment on the service would not only bind the person (requiring them to take down the post), but also encompasses responsibility of the web site operator to make sure this occurs. In one case, the court determined that a court may direct the provider, Yelp, to comply with a takedown order directed to the "originator of defamatory statements" (Hassel v. Bird, 2016). The case is currently on appeal and could be reversed—but in the meantime it signals more caution for internet sites, a degree of caution that was previously believed required under the law. But the bottom line message will remain the same: customers who post scurrilous reviews can invite a lawsuit and the lawsuit may in fact succeed.

Raising the stakes even higher on the ability of an aggrieved plaintiff to recover in a lawsuit are state law prohibitions against SLAPP suits. SLAPP is an acronym for "strategic lawsuit against public participation." In other words, SLAPP suits are intended to censor, intimidate, and silence critics by imposing them with legal defense costs that require them to abandon criticism. SLAAP prohibitions are not confined to internet peer review sites, but are prominent in that context. Anti-SLAPP statutes are in place in some states and include the

possibility that the individual who filed the suit may be subject to penalties or dismissal of the suit. The existence of anti-SLAPP legislation—and potential penalties—stands as a substantial deterrent to filing a defamation lawsuit, particularly when the object of the complaint is a message shared with the public. The SLAPP obstacle is not confined to internet contexts, but it is new and the internet context is also new. Perhaps for that reason, SLAPP statutes have played a significant role in internet restaurant review cases.

Before despairing at the state of modern civilization in this world of internet restaurant reviews, one must remember its salutary effects. For one, independent restaurants have fared quite well in the world of Yelp, Tripadvisor and the like. Quality is rewarded—and the tyranny of the majority is not. The positive effect of internet reviews for independent restaurants is apparently much higher that for chain restaurants (Vanderbilt, 2016, pp. 64-65). Internet peer reviews are enormously important for local independent restaurant for which independent knowledge is hard to acquire. But for chains: not so much so: "Does the world care if you do not happen to like the secret sauce on a McDonald's Big Mac? No—because billions of others apparently do" (Vanderbilt, 2016, p. 65). Alas, these effects have nothing to do with law. But of course the good and bad effects of legal regulation often lag behind other forces in society and law should ultimately take notice. Law has many beneficial qualities. But its conservative, precedent-regarding nature does not render it the most progressive force in human society.

Conclusion

The barriers to recovery for restaurants aggrieved by reviews are daunting: fact/opinion obstacles, protections for epithets and rhetorical hyperbole, the personal nature of taste, the federal Communications Decency Act, and the prevalence of SLAPP barriers under state law. How will things fare in upcoming years—now that we might be in an era of "post-truth?" The

current President of the United States once wrote in his book, THE ART OF THE DEAL: "People want to believe that something is the biggest and the greatest and the most spectacular. I call it truthful hyperbole" (Rosen, 2016). Is this an "American thing?" There are those who say that U.S. citizens simply "have a genius for overstatement" (Rosen, 2016). Or….put more cynically…one commentator observed that "[i]n the age of Trump, data and evidence are just some unwanted roughage down at the end of the buffet" (Mahler, 2016). Does that make it easier to destroy a restaurant with idiosyncratic, clever messages of despair about the quality of food? Or does it mean that potential patrons might be more willing to make their own judgments?

Certainly citizens should not indulge in deep despair at crushingly funny restaurant reviews. Not only is humor a cherished component of human society, but it is a powerful conduit for truth. Compelling images communicated by jokes stick and influence appetite for food. On the other side of the balance, one wonders whether the United States has a fetish for freedom of expression. We are certainly outliers in this area as compared to the rest of the world when it comes to protecting human dignity against savage speech. Many free societies—most prominently France and Australia—have no problem reigning in reviewers with fines or damage verdicts.[6] These results are not necessarily correct, but provide nuance and insight as we all should consider the sensitive matters of food and taste.

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1 This definition comes from the frequently followed black letter law of the RESTATEMENT (SECOND) OF TORTS §559 (1977). The state law landscape of defamation law is relatively uniform in the United States. To the extent that variation exists in this area, the law of New York and California is most pertinent to this paper, since these two restaurant/metropolitan capitals generate the most defamatory humor opinions on restaurants. Sometimes these states provide a fuller picture of what constitutes defamation than the bare-boned Restatement defamation. *See*, *e.g.*, Frank v. Nat'l Broad. Co., 506 N.Y.S.2d 869, 871 (1986) (stating that defamatory speech tends to expose the plaintiff "to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their intercourse in society" (quoting Sydney v. MacFadden Newspaper Publ'g Co., 151 N.E. 209, 210 (1926))).

2 CHEMERINSKY, E., CONSTITUTIONAL LAW: PRINCIPLES AND POLICES 929-930 (3d ed. 2006) (discussing the complexities of free speech's role in advancing "personhood and autonomy" as well as "promoting tolerance"); SMOLLA, R., 1 LAW OF DEFAMATION § 6:21 (2007) (reasoning that an "intelligent argument concerning the fact/opinion distinction cannot be marshaled without resort to discussion" of the distinction's attempt to protect reputation, while preserving an opportunity for robust criticism).

3 See for example the case of *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 N.Y. Misc.3d 974 (N.Y. Supreme Court 2004) (using both the heightened public figure standard and fact/opinion analysis to dispose of a lawsuit).

4 See for example the website dedicated as a parody of Guy Fieri's American Kitchen: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj25s6QqL3RAhUB5iYKHTsBDLYQFggbMAA&url=http%3A%2F%2Fwww.grubstreet.com%2F2013%2F02%2Fguy-fieri-guys-american-kitchen-fake-website.html&usg=AFQjCNGobdwdMxstmMJ1lpxmrfEraXoPAw&bvm=bv.144210762,d.eWE

5 For an older article documenting this point, see Joshua Cash, *The Difficulty in Winning Restaurant Defamation Cases,* Joshua A. Cash, "The Difficulty in Winning Restaurant Defamation Cases" (August 18, 2005). *bepress Legal Series*.Working Paper 684, http://law.bepress.com/expresso/eps/684

6For examples sanctions on French and Australian restaurant reviewers, see http://boingboing.net/2014/07/17/is-il-giardino-in-cap-ferret-t.html (describing a French review subject to a fine and order to remove review from early in French search results); http://www.grubstreet.com/2014/06/coco-roco-australia.html.